

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HENRY CASTILLO,

Plaintiff,

v.

BOBBIE BERKEY, et al.

Defendants.

CASE NO. C20-5251 BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION IN  
PART

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Michelle L. Peterson, United States Magistrate Judge, Dkt. 46, and Plaintiff Henry Castillo’s objections to the R&R, Dkt. 47.

**I. BACKGROUND**

Castillo, proceeding pro se and *in forma pauperis*, initiated this 42 U.S.C. § 1983 prisoner civil rights action claiming Department of Corrections (“DOC”) employees violated his Eighth and Fourteenth Amendment rights based on an alleged denial of durable medical equipment. Dkt. 4. He also alleges that the DOC employees’ conduct denied him reasonable accommodations under the Americans with Disabilities Act

1 (“ADA”), 42 U.S.C. §§ 12131–12132, and that a DOC employee arbitrarily “chilled” his  
2 grievance regarding these allegations.

3 Castillo’s claims stem from a leg injury he sustained as a result of a car accident in  
4 1981. *Id.* at 8. Castillo alleges his left leg is shorter than his right leg and that he requires  
5 elevated medical shoes to prevent bone-on-bone grinding in his knee and to prevent  
6 lower back pain that impacts his mobility. He is currently housed at Stafford Creek  
7 Corrections Center (“SCCC”) and asserts he was given a wheelchair and cane for his  
8 disability at SCCC. However, after a riot at SCCC, he was “forced to defend himself” and  
9 was subsequently placed in isolation. Based on information contained in the grievances  
10 attached to Castillo’s complaint, it appears he hit someone with his cane during the riot.  
11 As a result, Castillo alleges his wheelchair and cane were taken away by Defendants  
12 Stefanie Baltzell, Tim Taylor, and S. Bangs.

13 Castillo further alleges he made multiple requests for various accommodations for  
14 his disability. Specifically, he alleges he requested knee braces and elevated medical  
15 shoes. However, he asserts that Defendant Bobbie Berkey informed him that x-rays of his  
16 right knee showed that treatment for his moderate arthritis would include a change in  
17 medication, but that surgery was not warranted. And he further asserts Defendant Berkey  
18 informed him that x-rays showed the discrepancy between the length of his legs was only  
19 1.05cm, and policy requires discrepancies to be greater than 1.2cm for an inmate to  
20 receive elevated medical shoes.

21 Castillo thus brings claims against the individually-named Defendants for  
22 violations of his First Amendment, Eighth Amendment, and Fourteenth Amendment

1 rights and for violations of the ADA. On October 6, 2020, Defendants moved for  
2 judgment on the pleadings. Dkt. 34. Plaintiff submitted both a response on December 2,  
3 2020, Dkt. 45, and a surreply on January 4, 2021, Dkt. 43. On January 19, 2021, he  
4 additionally filed a motion for extension of time to file a response to Defendants' motion  
5 for judgment on the pleadings. Dkt. 44.

6 On March 23, 2021, Judge Peterson issued the instant R&R recommending that  
7 the Court grant Defendants' motion and dismiss Castillo's claims with prejudice. Dkt. 47.  
8 The R&R additionally recommended that the Court deny Castillo's motion for extension  
9 of time as his response substantively addressed Defendants' arguments. *Id.* at 4. On April  
10 13, 2021, Castillo objected. Dkt. 47. On April 26, 2021, Defendants responded. Dkt. 48.

## 11 II. DISCUSSION

### 12 A. Objections to the R&R

13 The district judge must determine de novo any part of the magistrate judge's  
14 disposition that has been properly objected to. The district judge may accept, reject, or  
15 modify the recommended disposition; receive further evidence; or return the matter to the  
16 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

17 In his objections, Castillo argues that DOC is negligent in its duty of care under  
18 Washington law. *See* Dkt. 47 at 3–5 (“DOC also has a continuing and affirmative duty to  
19 protect those in its custody from all foreseeable harms, including harms intentionally  
20 cause[d].” (internal citation omitted)). This argument does not respond to the R&R's  
21 conclusion that Castillo's § 1983 claim for alleged Eighth Amendment violations fails as  
22 a matter of law. Rather, it is a new legal theory for liability.

1       The R&R correctly concluded that Castillo cannot maintain his Eighth  
2 Amendment claim because, as evidenced in the exhibits attached to his complaint,  
3 Defendants were not deliberately indifferent to a serious medical need. *See Estelle v.*  
4 *Gamble*, 429 U.S. 97, 103–04 (1976). Prison officials are deliberately indifferent to a  
5 prisoner's serious medical needs when they “deny, delay or intentionally interfere with  
6 medical treatment.” *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).  
7 Furthermore, deliberate indifference is “more than mere negligence or isolate occurrences  
8 of neglect.” *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (internal citation  
9 omitted). Castillo’s pleadings and the exhibits attached thereto evidence that SCCC  
10 officials have not denied, delayed, or intentionally interfered with the medical treatment  
11 of Castillo’s leg. The Court agrees with the R&R and Defendants that Castillo’s  
12 disagreement with treatment is insufficient to support a claim of deliberate indifference.  
13 *See* Dkt. 46 at 9. The Court therefore adopts the R&R as to Castillo’s § 1983 Eighth  
14 Amendment Claim, and this claim is dismissed with prejudice.

15       In his complaint, Castillo asserts that Defendants violated the ADA, but the R&R  
16 concluded that Castillo failed to identify a particular service, program, or activity from  
17 which he was excluded. *Id.* at 10. For the first time in his objections, Castillo asserts that  
18 he has been excluded from activities like yard and gym, that his exercise ability is  
19 extremely restricted, and that no effort has been made to place him into a cell with hand  
20 holds to assist with the use of toilet facilities because of his disability. Dkt. 47 at 6. These  
21 new allegations could plausibly allege an ADA claim and could amount to more than a  
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1 claim of inadequate treatment for his disability. *Cf.* Dkt. 46 at 11. Therefore, the Court  
2 declines to adopt the R&R as to Castillo’s ADA claim.

3 Castillo did not object to the R&R’s conclusion that he cannot maintain his  
4 grievance claim as a matter of law. *See id.* at 11–12. The Court thus adopts the R&R as to  
5 this claim.

6 **B. Motion for Extension of Time/Appointment of Counsel**

7 Additionally in his objections, Castillo moves for extension of time to conduct  
8 legal research or, in the alternative, for appointment of counsel. Dkt. 47 at 2. Castillo has  
9 previously moved to appoint counsel, Dkt. 23, and the Court denied that motion, Dkt. 36  
10 (adopting Dkt. 31).

11 No constitutional right to counsel exists for an indigent plaintiff in a civil case  
12 unless the plaintiff may lose his physical liberty if he loses the litigation. *See Lassiter v.*  
13 *Dept. of Social Servs.*, 452 U.S. 18, 25 (1981). However, pursuant to 28 U.S.C.  
14 § 1915(e)(1), the Court has the discretion to appoint counsel for indigent litigants who are  
15 proceeding *in forma pauperis*. *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d  
16 564, 569 (9th Cir. 1995).

17 The Court will appoint counsel only under “exceptional circumstances.” *Id.*;  
18 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). “A finding of exceptional  
19 circumstances requires an evaluation of both the likelihood of success on the merits and  
20 the ability of the plaintiff to articulate his claims pro se in light of the complexity of the  
21 legal issues involved.” *Wilborn*, 789 F.2d at 1331 (internal quotations omitted). A  
22 plaintiff must plead facts that show he has an insufficient grasp of his case or the legal

1 issue(s) involved, as well as an inadequate ability to articulate the factual basis of his  
2 claim. *Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004).  
3 That a pro se litigant may be better served with the assistance of counsel is not the test.  
4 *Rand v. Roland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *overruled on other grounds*, 154  
5 F.3d 952 (9th Cir. 1998).

6 Castillo has not demonstrated a likelihood of success on the merits. Nor has he  
7 demonstrated he is unable to articulate his claims pro se in light of the complexity of the  
8 legal issues involved. The remaining legal issues are narrow and are not complex. His  
9 request to appoint counsel is again denied.

#### 10 **C. Leave to Amend**

11 “A district court should grant leave to amend even if no request to amend the  
12 pleading was made, unless it determines that the pleading could not possibly be cured by  
13 the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d  
14 242, 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue  
15 is whether there is liability as a matter of substantive law, the court may deny leave to  
16 amend. *Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

17 The R&R concluded that Castillo cannot maintain his claims as a matter of law  
18 and recommended that the Court dismiss his claims with prejudice. *See* Dkt. 46 at 13.  
19 Based on the new factual assertions raised in the objections, however, the Court has  
20 concluded that Castillo may have an ADA claim. Therefore, the Court grants Castillo  
21 leave to amend **only** his ADA claim. All other claims are dismissed with prejudice.  
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**III. ORDER**

The Court having considered the R&R, Plaintiff's objections, and the remaining record, does hereby find and order as follows:

- (1) The R&R is **ADOPTED in part**;
- (2) Defendants' motion for judgment on the pleadings, Dkt. 34, is **GRANTED in part and DENIED in part**;
- (3) Plaintiff's motion for extension of time, Dkt. 44, is **DENIED**;
- (4) Plaintiff may file an amendment complaint as specified above no later than July 9, 2021; and
- (5) This matter is re-referred to Judge Peterson for further consideration.

Dated this 26th day of May, 2021.



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BENJAMIN H. SETTLE  
United States District Judge